IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EDDY DANIEL GLACE, Appellant.	No. 37247-9-II UNPUBLISHED OPINION

Bridgewater, J. — Eddy Daniel Glace appeals his conviction for possession of over 40 grams of marijuana. He contends that he was subjected to an unlawful search and that his trial counsel was ineffective for failing to move to suppress evidence. We affirm.

Facts

Sometime between 10:00 pm and midnight on September 22, 2007, Officer Jacob Stout of the Kelso Police Department was driving his patrol car on Allen Street in Kelso, Washington. It was dark outside at this time. Glace was also on Allen Street riding a bicycle eastbound in the westbound lane. Glace was wearing dark clothing and did not have any lighting on his bicycle. Officer Stout had to swerve his vehicle to avoid colliding with Glace. After avoiding Glace, Officer Stout instructed him to stop his bicycle and initiated a traffic stop.

Officer Stout testified at trial that Glace was agitated, nervous, and mumbling. Glace put his hands in his front and back pockets and took them out nervously. Officer Stout directed Glace

to remove his hands from his pockets and keep them out. Officer Stout testified that Glace's behavior caused him to be concerned for his safety, and he asked Glace if he had any weapons on his person. Glace told Officer Stout that he did not have any weapons. Officer Stout asked Glace if he had anything on his person that he should not have. Glace said that he had marijuana in his back left pocket. Officer Stout testified that, at that point, the nature of the whole encounter changed, and he advised Glace that he was not free to leave. Officer Stout searched Glace's back left pocket and removed a bag of a substance resembling tobacco. Officer Stout testified that he recognized the substance as marijuana in part from its distinct smell, and arrested Glace. Later tests verified that the substance in the bag was marijuana and that the bag's contents weighed more than 40 grams.

The State charged Glace with one count of possession of over 40 grams of marijuana. Following a bench trial, the trial court found Glace guilty as charged. The court imposed a standard range sentence of 12 months and one day. Glace timely appealed.

Discussion

Glace contends that he was subjected to an unlawful search and his trial counsel was ineffective for failing to move to suppress the marijuana evidence resulting from the search. We disagree.

Although Glace did not object to the search at trial, we review this alleged error raised for the first time on appeal in the context of his ineffective assistance claim. *State v. Contreras*, 92 Wn. App. 307, 317-18, 966 P.2d 915 (1998). To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell

below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *Contreras*, 92 Wn. App. at 318 (citing *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). *See also State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the above noted two-prong test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)). Courts engage in a strong presumption that counsel's representation was effective. *McFarland*, 127 Wn.2d at 335.

As to the deficiency prong, the failure to move to suppress evidence in cases where there is a question as to the validity of a search and seizure is not per se ineffective assistance. *McFarland*, 127 Wn.2d at 336. There may be legitimate strategic or tactical reasons why a suppression hearing is not sought at trial, and defense counsel's legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance. *McFarland*, 127 Wn.2d at 336. Because the presumption runs in favor of effective representation, the defendant bears the burden of showing in the record the absence of legitimate strategic or tactical reasons supporting counsel's challenged conduct. *McFarland*, 127 Wn.2d at 336.

Here, rather than seek suppression of the contents of the bag that Officer Stout took from Glace, defense counsel relied on the contents of the bag and expert testimony regarding that evidence in moving to dismiss after the State rested. Defense counsel argued that the State had failed to prove that the contents of the bag contained more than 40 grams *of marijuana* (rather

than other foreign material), which was required to establish the felony offense as charged. Although the trial court denied the motion, counsel's decision to rely on the bag's contents, rather than seek to suppress that evidence, was a legitimate trial strategy and thus cannot serve as a basis for Glace's claim of ineffective assistance.

Glace relies on *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2004), which held that counsel's failure to seek suppression of methamphetamine seized in a search was deficient representation. But *Reichenbach* is inapposite because the methamphetamine was seized pursuant to an invalid search warrant and the record revealed no conceivable legitimate tactic explaining counsel's failure to seek suppression. *Reichenbach*, 153 Wn.2d at 130-31. As explained above, that is not the circumstance here.

Glace has not met this burden to show deficient performance. Failure to meet either prong of the *Strickland* test is dispositive of Glace's ineffective assistance claim. *State v. Berg*, 147 Wn. App. 923, 937, 198 P.3d 529 (2008) (defendant must establish both prongs to prevail on an ineffective assistance of counsel claim).

Were we to proceed to the prejudice prong, we would conclude that Glace has failed to meet his burden as to that prong also. To satisfy the prejudice prong of the *Strickland* test, a defendant bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation. *Contreras*, 92 Wn. App. at 318 (citing *Thomas*, 109 Wn.2d at 225-26). In both *McFarland* and *Contreras*, the courts rejected the ineffective assistance challenge because the claims failed the prejudice prong of the *Strickland* test. *Contreras*, 92 Wn. App. at 319; *McFarland*, 127 Wn.2d

at 337. Both cases applied the rule that where the record reveals a substantial basis for denying a motion to suppress, there is no affirmative showing that the motion probably would have been granted, and thus there is no showing of actual prejudice. *Contreras*, 92 Wn. App. at 318 (citing *McFarland*, 127 Wn.2d at 337 n.4). That is the circumstance here as well.

Glace argues that Officer Stout's search of his pocket was unlawful and thus the trial court would have been required to grant a motion to suppress the marijuana evidence obtained in that search. We disagree.

Absent an exception to the warrant requirement, a warrantless search is impermissible under article I, section 7 of the Washington Constitution. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). Exceptions to the warrant requirement include: (1) consent, (2) exigent circumstances, (3) search incident to a valid arrest, (4) inventory searches, (5) plain view, and (6) investigative stops under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *State v. Athan*, 160 Wn.2d 354, 406 n.4, 158 P.3d 27 (2007). Glace argues that Officer Stout's search of his pocket was unlawful because it was without a warrant and was neither a valid *Terry* weapons frisk nor a search incident to arrest. We need not address Glace's contention that the search of his pocket exceeded a weapons frisk, because we hold that Officer Stout's retrieval of the marijuana falls within the search incident to arrest exception to the warrant requirement. *See Schmidt v. Cornerstone Invs., Inc*., 115 Wn.2d 148, 165-66, 795 P.2d 1143 (1990) (a reviewing court is not obliged to decide all the issues raised by the parties, but only those which are determinative).

For the search incident to arrest exception to apply, article 1 section 7 of the Washington

Constitution requires that an actual, valid, custodial arrest precede the search. *State v. O'Neill*, 148 Wn.2d 564, 587, 62 P.3d 489 (2003). A "custodial arrest" is a seizure for purposes of detaining for later charges and trial, and thus is distinct from a limited detention for purposes of issuing a traffic citation, or conducting a brief investigation of possible criminal activity (i.e., *Terry* stop). *See State v. Lund*, 70 Wn. App. 437, 444-45, 853 P.2d 1379 (1993), *review denied*, 123 Wn.2d 1023 (1994). *O'Neill* explains that merely having probable cause to arrest is not enough and that the valid custodial arrest itself is what provides the authority of law to conduct the subsequent search incident to that arrest. *O'Neill*, 148 Wn.2d at 585.[1]

In *O'Neill*, although the officer had probable cause to arrest, based on the driver's admission that he was driving while his license was revoked or based on narcotics residue that was in plain view, the officer never arrested the driver. *O'Neill*, 148 Wn.2d at 583-84. By contrast, when Officer Stout had probable cause to arrest Glace, following Glace's admission that

[1] While *O'Neill* provides the applicable rule for determining availability of the search incident to arrest exception, the different facts in that case and Glace's case yield different outcomes. The *O'Neill* court determined that the search in that case was not preceded by a valid arrest. In *O'Neill*, an officer investigated a car that was parked in the lot of a business that had closed for the night. The car's occupant told the officer that although he had just driven the car from out of town, the car would no longer start. When the officer asked the driver for identification, the driver said his license had been revoked. The officer asked the driver to get out of the car for a pat down search. As the driver complied, the officer saw a cook spoon containing narcotics residue on the floor beside the driver's seat in plain view. The officer then asked the driver for consent to search the car, the driver initially refused, but ultimately consented. The officer then searched the car, found more drug paraphernalia and cocaine, and arrested the driver for unlawful possession of a controlled substance. The driver successfully moved to suppress the evidence and the Court of Appeals reversed. Our Supreme Court held that the cook spoon, which was found in plain view, need not have been suppressed, but the other drug paraphernalia and cocaine evidence found when the officer searched the car must be suppressed because a custodial arrest did not precede the search. *O'Neill*, 148 Wn.2d at 570-73, 592-93.

he had marijuana in his pocket, Officer Stout affirmatively and specifically informed Glace that he was not free to leave; and proceeded to search the pocket that Glace said contained the drugs. Under these circumstances, we hold that when Officer Stout told Glace that he could not leave—immediately following Glace's admission of a crime—Officer Stout made a valid custodial arrest based on probable cause and that the search of Glace's back pocket was incident to that arrest. *See Reichenbach*, 153 Wn.2d at 135 (objective test is used to determine whether a person is in a custodial arrest; the test is whether a reasonable detainee under the circumstances would consider himself under a custodial arrest).

Because we hold that Officer Stout's search of Glace's pocket was a search incident to arrest, Glace cannot demonstrate that a motion to suppress would have been granted. He therefore cannot show actual prejudice resulting from his counsel's failure to seek suppression, and his claim fails the second prong of the *Strickland* test. Accordingly, for this reason also, we would hold that Glace was not deprived of his constitutional right to effective representation of counsel. *Contreras*, 92 Wn. App. at 318-19.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Van Deren, C.J.

Penoyar, J.